No. 285.

FILED
NOV 5 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

S. ELBERT PIKE, ET AL., *Petitioners.*

v.

FRANK C. WALKER, (Substituted for James A. Farley, as Postmaster General of the United States), et al., *Respondents.*

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

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PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court:

Under date of October 13th, 1941, this Court entered its order denying petitioners' application for a writ of certiorari.

Petitioners now petition the Court for a rehearing, and for reasons therefor state that on a rehearing they are prepared to show that:

1. The action of this Court, in denying the application for writ of certiorari, leaves the principal questions presented, finally unsettled as a matter of vital Federal law.[1]

[1] The United States Court of Appeals for the District of Columbia in its opinion stated that it could not accept the proposition urged by the Postmaster General and accepted by the Court below as being too far-reaching to be admitted until specifically recognized and declared by this Court, thereby, in effect, inviting this Court to pass upon the question for the guidance of litigants in similar cases in the future.

2. The decision of this Court by leaving the decision of the Appellate Court unchanged and unclarified, in effect nullifies the decision of this Court in *Crowell* v. *Benson*, 285 U. S. 22, wherein it was held that a Court in reviewing an order issued by an administrative agency having quasi-judicial status, is not limited to an ascertainment as to whether there was substantial evidence to support the order, but should also consider jurisdictional and constitutional questions and facts when same are properly raised and presented.

3. The denial by this Court of the application for certiorari leaves the large and substantial mail order business in general, and your petitioners' business in particular, open to control and destruction by prosecuting administrators in disregard of the principles of administrative due process of law, as established by this Court in *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, respectively.

4. The decision of this Court in denying petitioners' application for certiorari has the effect of establishing as entirely new and unprecedented law, the opinion of the United States Court of Appeals for the District of Columbia, to the effect that a citizen alleged to be a wrongdoer has no right to complain of, and secure relief against, the deprivation of his property without due process of law.

5. A definite decision on the Constitutional question by this Court is in the public interest, in view of the growing administrative and legislative tendency to relegate individual rights into the background under the excuse of administrative convenience and expediency.

ARGUMENT.

1. Is the rule laid down in Crowell v. Benson, 285 U. S. 22, that jurisdictional and constitutional questions and facts must be considered de novo by the reviewing Court, when properly raised, no longer the law of the land?

Petitioners submit that this Court, in denying the application for certiorari, has in effect permitted the rejection of the doctrine of *Crowell* v. *Benson* by the United States Court of Appeals for the District of Columbia. In the instant case, petitioners' application succinctly set forth, and the record so established, that the Appellate Court declined to apply the principles of due process of law (which it had correctly enunciated in its opinion) on the ground that petitioners were not entitled to consideration upon the constitutional point because they had not presented to the Appellate Court the transcript of evidence taken before the Post Office Department upon which the fraud order was allegedly based, and that therefore in the absence of such transcript of evidence, the Appellate Court was compelled to accept the conclusion of the lower Court that there was substantial evidence to support the order and that petitioners were therefore wrong-doers not entitled to relief. The law is thus left unsettled and petitioners are left without redress from a deprivation of their property without due process of law as a result of the fraud order proceedings.

Crowell v. *Benson* (*supra*) established the precedent that a Federal Court called upon to review the quasi-judicial order of an administrative tribunal should consider *de novo* Constitutional and jurisdictional facts if properly raised. This Court even went so far, on pages 49 and 50 of its opinion, to refer to the exercise by this Court of its jurisdiction to deny affect to any administrative finding which is without evidence—or where the hearing is "inadequate" or "unfair" or arbitrary in any respect. Citing *Interstate Commerce Commission* v. *Louisville N. R. Co.*, 227 U. S.

91, 92; *Tagg Bros. and Moorehead* v. *United States,* 280 U. S. 442. The Court further said at page 60:

> "*In cases brought to enforce Constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions both of fact and law,* necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This Court has held that the owner should be entitled to 'a fair opportunity for submitting that issue to its judicial tribunal for determination upon its own independent judgment as to both law and facts.'" Citing Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287; Pendergast v. New York Telephone Company, 262 U. S. 43, 50; Tagg Bros. and Moorhead v. United States, 280 U. S. 420; Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 600. (Emphasis supplied).

Four years subsequent to the Crowell decision, this Court ordered trial *de novo* for "Constitutional fact" in *St. Josephs Stockyards Company* v. *United States,* 298 U. S. 38. In no case has this principle of law been overruled or limited. Trials *de novo* have been granted in three cases by this Court, following the rule expressed in the *Crowell* case. *Borax Consolidated, Ltd.,* v. *Los Angeles,* 296 U. S. 10, 18 (1935) (review of jurisdiction of United States Land Office); *United States* v. *Idaho,* 298 U. S. 105 (1936) (review of Interstate Commerce Commission); and *Baltimore & O. R. R.* v. *United States,* 298 U. S. 349 (1936) (review of Interstate Commerce Commission).

The doctrine of the *Crowell* case has been followed at least seven times in other Federal Courts. *Green* v. *Crowell,* 69 F. (2d) 762, (C. C. A. 5th 1934); *Metropolitan Casualty Insurance Company* v. *Hoague,* 72 F. (2d) 175, (App. D. C. 1934); *Denver Union Stockyards Company* v. *United States,* 57 F. (2d) 735, (D. C. Colo. 1932); *Wichita Gas Company* v. *Public Service Commission,* 2 F. Supp. 792 (D. C. Kansas 1933); *Appalachian Electric Power Company* v. *Smith,*

4 F. Supp. 6, (D. C. Virginia 1933); *United States* v. *International Trading Corp.*, 20 F. Supp. 357, (D. C. N. Y. 1937); *Metropolitan Sand and Gravel Corp.* v. *Lowe*, 22 F. Supp. 65 (D. C. N. Y. 1938). The Circuit Court of Appeals for the First Circuit even extended it to a consideration of the Johnson Act. *Munoz* v. *Porto Rico Ry. Light and Power Company*, 83 F. (2d) 262, (C. C. A. 1st 1936).

While *Crowell* v. *Benson* was not referred to by the Court, yet the Third Circuit Court of Appeals in *Berkshire Employees Ass'n.* v. *National Labor Relations Board*, 121 F. (2d) 235, recently remanded the case to the Administrative Agency with instructions to take additional evidence on the Constitutional fact alleged by the Employer, that he did not have a hearing before an impartial tribunal. Is a decision by a partial and biased judge any more of a deprivation of due process than a judgment entered by a judge who neither heard nor read nor in any way considered the evidence?

Other cases, and other utterances of the Judges deciding the instant case, are inconsistent with the entire premise that a decision on a Constitutional question when properly raised is dependent upon a showing that evidence on the merits must also be presented. Mr. Chief Justice Groner who wrote the opinion for the Court of Appeals in the instant case, expressed his views on the general subject in his letter to the Attorney General of the United States accompanying the report of the Committee on Administrative Procedure (Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Congress First Session) at page 248, wherein he stated as follows:

> "What I advocate is as basic as the *universally conceded right* of every individual to claim the equal protection of the law whenever he receives an injury and the constant duty of the government to afford that protection. * * * Second, assuming this complete separation of the functions of prosecutor and judge in administrative procedure, the findings of fact of the administrative officer or tribunal making an order or

> adjudication if supported by substantial evidence should be conclusive in any judicial review *except where a Constitutional right or privilege is in issue.*" (Emphasis supplied).

Justice Groner in his report went on to refer to "that which is *the fundamental right* of the citizen to have—an open, fair and unbiased determination of his rights when charged by the government with violation of regulatory statutes."

That the Court of Appeals rejected the doctrine in *Crowell* v. *Benson* is indicated by the language of the opinion (R. 80) wherein it is stated:

> "* * * if the proof of guilt here had been such as to which reasonable men might differ, the irregularity in the administrative proceeding, if there was irregularity, would have presented the case in a different aspect and made necessary a decision on the Constitutional question as to which we express no opinion."

In other words, the Court very definitely rejected the principles of the *Crowell* case in favor of some other unprecedented reasoning that an alleged wrong-doer has no standing under the Constitution. That this position is entirely contrary to other contemporaneous legal reasoning by the same Court is exemplified by the *per curiam* opinion of the same Court delivered just three weeks previous to the decision in the instant case, in *Whitaker* v. *McLean,* 118 F. (2d) 596, —— D. C. App. ——, decided February 24, 1941, on which the Chief Justice also sat. In the opinion in the *Whitaker* case, this language is expressive:

> "A right to be tried by a Judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If before a case is over a Judge's bias appears to have become overbearing, we think it disqualifies him. It follows that the judgment must be reversed. *It is more regrettable because it is our impression based on an examination of the record that the claim on which the plaintiff sued was probably without merit.*" (Emphasis supplied).

In the *Whitaker* case, the Court says that a fair trial must be afforded a litigant and reverses an adverse decision against that litigant even though it appears to them, that there is no merit in the litigant's case. In the instant case three weeks later, the same Court says that an alleged wrong-doer who does not bring up the voluminous transcript of testimony taken before the Post Office Department but who relies entirely upon the fact that such evidence played no part in the final judgment with the resulting invasion of Constitutional rights through not being afforded a fair trial—may not have that question considered.

Is the formalistic presentation of a costly printed (at the time) record (even one disclosing a lack of merit to the cause of action) the lodestar which guides a decision upholding the right to a fair trial in one case, and denies the same right in another—where no record is presented? The position is inconsistent, for due process of law—the right to a fair, unbiased trial and a judgment representing a reasonable conclusion on evidence—is still due process of law whether in a lower court or before an administrative body where there is little to distinguish the presiding officer from the prosecutor. If anything, the inclination should be toward the stricter application of judicial standards to a quasi-judicial proceeding where the active participants are subordinate employees rather than persons qualified by their experience and background to be appointed by the President, with the approval of the Senate, to judicial positions.

The attitude expressed in the opinion of the United States Court of Appeals for the District of Columbia to the effect that the conclusion of the Trial Judge (that the fraud order was supported by substantial evidence[2]) in

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[2] Such a conclusion places the Trial Court in the position of considering and passing *de novo* upon evidence which was not considered by the Postmaster General. The generalization of the conclusion and the Trial Court's failure to elaborate or to make any specific finding or statement as to such evidence (as he did on the Constitutional point), indicates that such "evidence" played no part in the decision.

effect, because of the failure to bring up on appeal the record of the testimony before the Post Office Department, is a foreclosure of petitioners' right to have the Constitutional due process of law points decided, is further inconsistent with, and contrary to, the Appellate Court's own ruling in the *Whitaker* v. *McLean* case; is contrary to the public utterances of the Chief Justice who wrote the opinion in the instant case; and is in direct conflict with the rule of law laid down by this Court in *Crowell* v. *Benson, (supra)*, which has been upheld and applied in the many cases cited hereinbefore.

A further generalization that could be made in connection with the application of the doctrine of Constitutional right to fraud order actions of the Post Office Department, is the doctrine established by this Court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, wherein it was held that a fraud order issued by the Postmaster General "by reason of an error of law", violates the property rights of the person whose mail is thus withheld. When considered in the light of the "substantial evidence" rule and the "upon evidence satisfactory to the Postmaster General" prescription of the fraud order statutes[3], the failure of that officer to consider the evidence amounts to an error of law, since he has not based his decision and order on evidence.

Petitioners submit that this is the first clear-cut case on this proposition that has reached the Federal Courts. The fraud order cases set forth in respondents' brief[4] in which certiorari to the United States Court of Appeals for the District of Columbia has been denied by this Court, are readily distinguishable from the instant case on the facts

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[3] Sections 3929 and 4041 Revised Statutes as amended (Title 39 U. S. C. A. Sections 259 and 732).

[4] *Plapao Laboratories, Inc.* v. *Farley*, 92 F. (2d) 228 (App. D. C.), certiorari denied, 302 U. S. 732; *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 96 F. (2d) 861 (App. D. C.), certiorari denied, 305 U. S. 624, and *Simmons* v. *Farley*, 99 F. (2d) 343 (App. D. C.), certiorari denied, 305 U. S. 651.

alone, for in none of the cases cited was it shown: (1) that the Postmaster General did not consider the evidence; (2) that the active prosecutor guided and to all intents and purposes controlled the decision in the case; (3) that the so-called "hearing" insofar as the respondents therein were concerned, terminated with the conclusion of respondents' evidence.

The decision of the Court of Appeals, if allowed to stand without clarification by this Court, is tantamount to an invitation to Post Office Department officials in their role of censors of all mail matter, to issue fraud orders without any hearing at all. Under such a theory the Post Office Department could issue a fraud order against a citizen without notice or a hearing on a slim piece of "evidence" contained in a Post Office Inspector's ex parte report and when the citizen woke up to the fact that his property had been confiscated, he would not be entitled to relief in the Federal Courts because there was some unopposed and uncontradicted evidence on which the order was based. He could thereby not be heard to complain (under the Court of Appeals theory) against the invasion of his rights under the due process of law provision of the Fifth Amendment to the Constitution. Such a theory could hardly be tenable under our system of Constitutional government based on a separation of powers. It is only by the invoking of the judicial power that such tendencies can be curbed and limited and the Constitutional guarantees and protection afforded the citizen.[5] Parenthetically, it is of course entirely proper to assume that no government official wilfully and deliberately sets out to artibrarily trump up charges and evidence, but subordinate administrative offi-

[5] "But for those who believe that administrative bodies should be subject to some jurisdictional check there remains the comfort of the doctrine of jurisdictional fact, narrow enough perhaps to avoid impeding the administrative process unduly; broad enough to give reassurance that the Courts are still at their posts, keeping administrative agencies within their jurisdiction." Larson—The Doctrine of "Constitutional Fact", 15 Temp. U. L. Q. 185 (1941).

cials are human beings just as are judges, some of whom are subject to personal prejudice and bias.

The instant case involves a somewhat analogous situation, for while notice was given and evidence-taking sessions were held at which the respondents therein appeared, yet the case to all intents and purposes was decided ex parte by the active prosecutor. The final judge, the Postmaster General, in the ordinary routine of his office signed a paper which the prosecutor had prepared, glanced at an ex parte recommendation, and did not bother to consider the evidence or the contentions of the respondents. Such a practice coupled with an entirely ex parte procedure during the intermediate and concluding steps, has apparently existed in the issuance of fraud orders for many years, for as was said in Part 12 of the Monograph of the Attorney General's Committee on Administrative Procedure relating to the Post Office Department (Senate Document No. 186, 76th Congress 3d Session, on page 31):

> "Upon approval by the chief attorney of the fraud section and by the Assistant Solicitor the decision is transmitted to the Solicitor and he may of course read the record if one is made and says that on occasion he does. Necessarily, however, he is dependent upon the report and material submitted by his subordinates."

The Monograph goes on to state on pages 31 and 32 that it is impossible to ascertain the extent of the Postmaster General's consideration of the case, but that it may even more safely be guessed that the consideration is ordinarily very limited and that examination of sample cases disclosed that usually the Postmaster General approves the decision on the same day or the day after it is submitted to him. A footnote on page 32 referred to the testimony of former Solicitor Donnelly of the Post Office Department in the case of *National Weeklies* v. *Farley* (District Court of the United States for the District of Columbia, 1939, unreported), wherein it was stated that the issuance of a fraud order was a routine matter with the Solicitor's office and that in

his experience as Solicitor he could not recall many cases where the Postmaster General ever read the record in a fraud case. (See also final report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Congress first session, pages 152 and 153, commenting on the difficulties faced by a respondent cited to show cause in a fraud order proceeding.

CONCLUSION.

The Court of Appeals has therefore declined to apply the doctrine of "Constitutional jurisdictional fact" as fixed by this Court in *Crowell* v. *Benson* and has, in effect, reversed this Court to that extent. Such a situation gives rise to the utmost confusion in attempting to apply the law of the land, as expressed by this Court, particularly in the District of Columbia, the seat of the Government where the greater part of Federal Administrative litigation arises.

If there is to be such a reversal, then it should come from this Court in unequivocable language so that it cannot be said that a standard of Federal law applies in the District of Columbia while an entirely different one applies to the rest of the United States. By the same token, if the Constitutional-right doctrine of *Crowell* v. *Benson* is still the law of the land then the Court of Appeals is in error and should be reversed.

Today, more than at any other time, a decision by this Coourt on the question presented by this case, is in the public interest, for with the growing encroachment of the executive authority on individual liberties and rights of property under the present emergency, the Post Office Department would be entirely free to use its power over the mails to destroy any and every type of business activity without due process of law unless some higher authority judicially fixes and determines the limit of that power under the Constitution of the United States.

The respondents' reference to the three other fraud order cases, in which certiorari was sought and denied during

the past three years, indicates the importance of the question and the pressing need for some determination by this Court as to whether any limit is to be placed on the extent to which Post Office officials may go in their confiscation (as distinguished from licensing or permissive) activities, without applying the standards of due process of law.

The record of this case unequivocally presents a factual basis for a final determination of the question.

For the reasons above set forth it is respectfully submitted that this petition should be granted and this case reviewed on certiorari by this Court.

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I hereby certify that the within petition is filed in good faith and not for purposes of delay.

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